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definition of debt, the expression used in the law. * * * This then, is a case, in which unliquidated damages are demanded, in which the contract alleged as the cause of action affords no rule for ascertaining them, in which the amount is not, and cannot with propriety be, averred in the affidavit, and which is and must be altogether uncertain until the jury have ascertained it, for which operation no definite rule can be presented to them." This is the rule that has been declared since in the courts that have held attachment not to lie on unliquidated demands. Thus a rule laid down in giving a liberal construction to a narrow statute has been applied in giving a strict construction in the face of the express words of statutes which warranted no such limitation. The decisions on the question are very numerous, and in nearly or quite half of the states, a rule has been established as above stated without anything in the statute to warrant the limitation. In a few states it is squarely held that the fact that the demand sued on is not for liquidated damages is no objection to the attachment, since the judge can limit the amount to such sum as he deems reasonable.

In Michigan the rule laid down in the case of *Clark v. Wilson* was recognized but held not applicable, in the early case of *Roelofson v. Hatch*, 3 Mich. 277; and in the recent case of *Showen v. J. L. Owens Co.* (Oct. 4, 1909), — Mich. —, 122 N. W. 640, the court has again recognized the rule, and again held it inapplicable, sustaining an attachment in an action for damages for breach of warranty of machinery as sound and suitable for a purpose.

J. R. R.

WILL A MARRIAGE, BIGAMOUS IN INCEPTION, BECOME VALID AFTER THE DEATH OF THE UNDIVORCED SPOUSE?—In a recent decision the supreme court of Oklahoma held that a marriage, both parties to it knowing that the husband had a living and undivorced spouse, did not ripen into a valid common law marriage after the death of the undivorced spouse, though both parties knew immediately of the death and afterwards continued to live together as husband and wife and were so recognized in the community in which they lived. There appeared to be no divided repute in the community as to their relationship. *Clark et al v. Barney et al.* (1909), — Okl. —, 103 Pac. 598. The decision is based upon the ground that public policy forbids the recognition of such a marriage, as tending to place a premium upon a disregard of the sacred nature of the marital relation.

A continuation of a meretricious cohabitation raises no presumption of a legal marriage. Slight circumstances, however, are sufficient to show a change in the minds of the parties raising the presumption of marriage. BISHOP, MARRIAGE, DIV. & SEP., §§ 964 & 965. Supported by *Hyde v. Hyde*, 3 Bradf. Sur. 509; *Gall v. Gall*, 114 N. Y. 109. And this is so, although the circumstances fail to show when or how the change from concubinage to matrimony took place, if the circumstances show that such a change has taken place. *Caujolle v. Ferrié*, 23 N. Y. 90; *Badger v. Badger*, 88 N. Y. 546, 42 Am. Rep. 263.

The following cases have held that where a disability exists, if the parties desire marriage and do what they can to make the relation matrimonial,

cohabitation will make them man and wife from the time the disability is removed, whether they knew of the existence or removal of such disability or not. *Petit v. Petit*, 91 N. Y. Supp. 979; *Schuchart v. Schuchart*, 61 Kan. 597, 50 L. R. A. 180; *De Thoren v. Atty.-General*, 1 App. Cas. 686; *State v. Worthingham*, 23 Minn. 528; *Teter v. Teter*, 88 Ind. 494; *Blanchard v. Lambert*, 43 Ia. 228, 22 Am. Rep. 245.

Some courts have held that without proof of actual marriage it will not be presumed from continued cohabitation and reputation that a relation, illicit in the beginning, has been changed to that of husband and wife. *Reading Fire Ins. Co.'s Appeal*, 113 Pa. 204; *Harbeck v. Harbeck*, 102 N. Y. 714; *Hunt's Appeal*, 86 Pa. 294; *Collins v. Voorhees*, 47 N. J. Eq. 555, 14 L. R. A. 364, 24 Am. St. Rep. 412, 22 Atl. 1054. The above rule does not seem to be supported by the weight of authority, and it does not appear to work out justice to the parties, in case their intentions were to establish a legal relation. In *Lapsley v. Grierson*, 1 H. L. Cas. 498, it was said that the law presumes, in the absence of proof to the contrary that the conduct of man is lawful. If the last rule is followed the presumption must be that the conduct of the parties is unlawful and was so meant to be. The principal case is an illustration. The parties apparently meant to establish an honorable relation; they went through the marriage ceremony and allowed it to be understood in the community in which they lived that they were husband and wife; but the court refused to allow this intended relation to come into existence, even after all disability had been removed, and the intent of the parties remained clear. Such a rule certainly does not favor legitimacy and although based upon the ground of public policy it does not seem that public policy demands the results that must follow if this rule is adopted.

Cunninghams v. Cunninghams, 2 Dow 482, holds that an intention to assume the matrimonial relation, followed by undivided repute as to the relation in the community in which the parties reside will constitute a lawful marriage. The principal case denies this rule and adopts the one that if the original cohabitation is illegal it must remain so, and no circumstances can change it. This view forces the parties and their offspring into a degrading position against their will and intent.

At common law consent to the marriage relation may be implied from a subsequent acknowledgment of the parties or from proof of cohabitation or of general reputation resulting from the conduct of the parties. (Bouvier.)

The famous case of *Campbell v. Campbell*, (*Breadalbane Case*) L. R. 1 H. L. Sc. 182, is in accord with the above. In that case it was held that a relation, illicit in the beginning, could ripen into marriage by general repute and conduct. But to raise the presumption of marriage from cohabitation and reputation the reputation must not be divided and the cohabitation must be matrimonial from its inception. In this case the presumption that the cohabitation was matrimonial from its inception was not as strong as in the principal case for in the *Breadalbane* case there was no actual marriage before cohabitation, but the intent had to be implied from the conduct of the parties, while in the principal case there was actual marriage before cohabitation. See also: *Clayton v. Wendell*, 4 N. Y. 230, 235; *Barnum v.*

Barnum, 42 Md. 251; *Cunninghams v. Cunninghams*, 2 Dow 482; *Jones et al. v. Hunter et al.*, 2 La. Ann. 254; *Hamilton v. Hamilton*, 9 Clark & F. 327; *White v. White*, 82 Cal. 427, 7 L. R. A. 799. Contra. *Rose v. Rose*, 67 Mich. 619.

Badger v. Badger, 88 N. Y. 547, 42 Am. Rep. 263, is to the effect that a common law marriage will suffice to change a cohabitation which is illicit in its origin to one which is lawful. The principal case refuses this rule, and considers the relation of the parties to continue to be illicit, for if repute and intent are to count for anything the parties were certainly married at common law.

Judge ANDREWS, in *Hynes v. Mc Dermott*, 91 N. Y. 451, 459, 43 Am. Rep. 677, says, "The presumption of marriage, from a co-habitation, apparently matrimonial, is one of the strongest presumptions known to the law. When there is enough evidence to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence." This view is supported by *Caujolle v. Ferrié*, 23 N. Y. 90; *Badger v. Badger*, 88 N. Y. 546; *Gall v. Gall*, 114 N. Y. 109; *Matter of Mathews*, 153 N. Y. 443, 47 N. E. 901.

In *Yates v. Houston*, 3 Tex. 450, HEMPHILL, C. J., says: "Admitting that the original intercourse was illicit, with the knowledge of the parties, it is urging the presumption to an unreasonable extent to suppose that the unlawful character of the connection was unsusceptible of change, and that when all legal disabilities had ceased to operate they would voluntarily decline all the honors, advantages and rights of matrimony, and prefer an association disgraceful to both parties." See: *Peet v. Peet*, 52 Mich. 464, 18 N. W. 220; *Taylor v. Swett*, 3 La. 33, 22 Am. Dec. 156; *North v. North*, 1 Barb. Ch. 241; *Gibson v. Gibson*, 24 Neb. 394, 39 N. W. 450; *Donnelly v. Donnelly*, 8 B. Mon. 113; *White v. White*, 82 Cal. 427, 7 L. R. A. 799, 23 Pac. 276.

A. F. H. W.